No. 1375

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

In Admiralty. *In Personam.*

PACIFIC MAIL STEAMSHIP COMPANY,

Libelee-Appellant,

AGAINST

ALFRED IVERSON, JOHN KENNEDY, PATRICK MURPHY, THOMAS ROE and GEORGE MORRISSEY,

Libelants-Appellees.

APPELLANT'S BRIEF.

E. B. McCLANAHAN,
Proctor for Appellant.

KNIGHT & HEGGERTY,
Of Counsel for Appellant.

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STATEMENT OF CASE.

Each of the above appellees filed libels against the appellant, alleging damages for breach of contract of carriage on libelant's Steamship "Mongolia" from Yokohama, Japan, to San Francisco. The

libels, answers and facts being similar, the suits were ordered consolidated for trial, though separate judgments were awarded in each of them.

In August, 1905, these appellees shipped on the appellant's Steamship "Barracuda" at San Francisco, for a voyage of nine months to Siberia and return. The Steamship "Barracuda" carried salt, a contraband of war, and was captured by the Japanese and taken, with her crew, to a Japanese port. The crew was subsequently released by the Japanese in the City of Yokohama, where it was furnished by the captain of the Steamship "Barracuda" with steerage transportation on the appellant's Steamship "Mongolia" to San Francisco. This latter ship arrived at the port of Honolulu with the crew of the Steamship "Barracuda" on board, on October 27th, 1905. Honolulu, at the date of the arrival of the Steamship "Mongolia", was an infected port, and under a promulgated regulation of the United States Marine Hospital Service, through steerage passengers on ships destined for ports on the Pacific Coast of the United States, were not allowed to come ashore. And if such did come ashore, they were not permitted to return to the ship.

Out of the crew of some thirty-five men of the Steamship "Barracuda", seven left the Steamship "Mongolia" voluntarily and entered the infected city, the appellees being of the number, and were refused permission to return on board, and the

"Mongolia" sailed without them for San Francisco. Libels were filed by six of these men, who claimed a breach of contract of carriage on the Steamship "Mongolia" from Yokohama to San Francisco.

The defense rests upon two theories:

First: The appellant claims that under the circumstances of this case, and because of the relation existing between it and the appellees, a voluntary quitting by these men released it of the obligation to give them a continuous passage to San Francisco on the "Mongolia", and that its subsequent offer to carry them by its next steamer, which was refused, absolved it from all claim for damages.

Second: If there was a contract for a continuous carriage on the Steamship "Mongolia" from Yokohama to San Francisco, then appellant claims a release from all obligation under such contract, by reason of the voluntary violation by the appellees of the regulation of the Marine Hospital Service.

In considering these defenses, the Court's attention is called first to an apparent error of the trial Court bearing on the question of the credibility of witnesses. In that part of its decision, found on page 461 of the record, the Court, in deciding a material point against the appellant on a conflict of evidence, and as substantiating its decision, says that "they (the appellees) gave their testimony " with apparent readiness and frankness".

This, we say, was an erroneous statement, for, as a matter of fact, the trial court never saw these men, and their evidence, and all of it, was taken before a Commissioner, as the record will show.

On this appeal we shall invoke a well established rule, and ask for an examination of the whole record on the facts.

> Lazarus v. Barber, 136 Fed. Rep. 534-535;
> The Frey, 106 Fed. Rep. 319-321.

Third: Appellant has assigned error (Trans. p. 540) in order of the Court (Trans. p. 514) denying its motion to *Retax Costs* (Trans. p. 492), and allowing (Trans. p. 522) mileage of Geo. A. Davis, Attorney for Libelants, for his expenses to San Francisco, $205 for the hearing of depositions in the case, and his expenses while in San Francisco in such work (Trans. p. 514 and p. 522).

SPECIFICATION OF ERRORS.

The appellant relies upon the following errors, wherein the Decrees appealed from are erroneous:

1.

The Court erred in finding that all the material allegations in the respective libels herein are true

2.

The Court erred in holding that upon the facts appearing on the trial of said causes, there was a definite undertaking on the part of the libelee to carry the respective libelants from Yokoham to San Francisco on board the Steamship "Mongolia", as shown by the steerage checks introduced in evidence as well as by all of the undisputed facts pertaining to the transaction.

3.

The Court erred in holding that upon the facts appearing on the trial of said causes, the weight of evidence is entirely on the side of libelants as to the issue whether said libelants were informed by the libelee of the order of the officials of the United States Marine Hospital Service against their going ashore at Honolulu.

4.

The Court erred in finding that the libelants were not notified of the United States Marine Hospital Service regulation against going ashore at Honolulu.

5.

The Court erred in finding that upon the facts appearing on the trial of said causes, the libelee was guilty of negligence toward the respective libelants for which it is liable for the injury to the libelants resulting therefrom.

6.

The Court erred in holding that upon the facts appearing on the trial of the said causes the libelee was guilty of any negligence.

7.

The Court erred in holding that upon the facts appearing on the trial of said causes, the injury resulting to the libelants respectively, as alleged in their respective libels, was caused through the negligence of the libelee, or by reason of a breach of duty due the respective libelants from said libelee.

8.

The Court erred in finding that upon the facts appearing on the trial of said causes, any damage had accrued to the respective libelants.

9.

The Court erred in finding for the respective libelants and against the libelee.

10.

The Court erred in entering final decrees in favor of the respective libelants ordering that the respect ive libelants, Alfred Iverson, John Kennedy, Patrick Murphy, Thomas Roe and George Morrissey, have and recover of and from the libelee, and that the libelee do pay to the said respective libelants the

sum of $150.00 and their respective costs and disbursements.

11.

The Court erred in entering final decrees in favor of the libelants, Alfred Iverson, John Kennedy, Patrick Murphy, Thomas Roe and George Morrissey, or either of them.

12.

The Court erred in not making, rendering and entering final decrees in each of the above-entitled actions in favor of libelee.

13.

The Court erred in making, rendering and entering the respective final decrees in said actions upon the findings and records therein.

14.

The Court erred in making, rendering and entering its decree in each of said actions because said decrees and each of them were and are contrary to law and equity and to the facts as stated and shown in the pleadings and record in said actions.

(Trans. p. 454-465.)

15.

The Court erred in affirming and allowing the item of $205 as libelee's costs and disbursements,

being mileage of G. A. Davis, Attorney for Libellants, to San Francisco, and his expenses while there, for the hearing of depositions in the case.

(Trans. p. 514 and p. 522.)

ARGUMENT.

(1.)

The appellees, members of the crew of the Steamship "Barracuda", were under articles entered into with the appellant, by which they were to be returned to the port of shipment (San Francisco) within nine months from August 22nd, and it was in furtherance of this contract, and no other, that they were being carried as "passengers" on the Steamship "Mongolia". If these men did any act without the consent of the other party to the articles of shipment, which made it impossible for their carriage to be completed by the ship employed by the appellant, then we submit the appellant is released from resulting damage. While, as between the "Mongolia" and themselves, the status of the members of the crew of the "Barracuda" might be said to be that of passengers; they were on a different footing, when their relationship towards the appellant is considered, because of their articles of shipment.

Had these libels been brought in rem, the question of contractual relations with the Pacific Mail Steamship Company, by reason of the "Barracuda"

articles, would not have been important, but the suits being against the Pacific Mail Steamship Company, it is relevant and proper to know the antecedent contractual relations leading to the passage of these appellees on the Steamship "Mongolia". Admittedly, appellees paid to appellant no money for a passage from Yokohama to San Francisco, and yet it is conceded that such passage was due appellees from appellant.

The record shows the situation clearly:

Appellee ALFRED IVERSON testified, on cross-examination, as follows:

Q. How long was that voyage? (referring to that of the "Barracuda".)

A. We was to serve not to exceed nine months.

* * * * * * *

Q. That is, your articles were to ship for a voyage to Siberia and return?

A. Yes, sir.

(Trans. p. 128.)

Q. In your individual capacity you did not apply for any ticket to the agent of the Pacific Mail Company at Yokohama, did you?

A. No, sir.

Q. The captain did it for you?

A. The captain told us he would get it for us.

Q. He did for the whole crew?

A. Yes, sir.

(Trans. p. 129.)

Q. Didn't you get money in Yokohama?

A. In Yokohama we did, yes, sir.

Q. Did you spend it before you took passage on the "Mongolia"?

A. Yes, sir.

Q. Who did you get that money from?

A. From the agents.

Q. The agents of what?

A. Of the Pacific Mail.

Q. That was on account of your wages due from the "Barracuda" voyage?

A. Yes, sir.

* * * * * * *

Q. How long after that was it that you sailed on the "Mongolia"?

A. About—a little over two weeks.

Q. In the interim had not the "Siberia" passed through Yokohama?

A. Yes, sir.

Q. Why didn't you go on her?

A. We didn't get no privilege to go by her; we was supposed to go on her, but then the captain told us there was no room.

Q. The captain of the "Siberia"?

A. Our captain.

(Trans. pp. 130-131.)

Q. Now, on the arrival of the "Mongolia", will you please tell just what happened?

* * * * * * *

A. In Yokohama; well, the "Mongolia" arrived in Yokohama; our chief engineer, Mr. Morse, comes;—the captain sends word to the hotel to have our things packed and be ready to go aboard the company's launch that came to the dock to take us out to the "Mongolia". At half-past one or half-past twelve o'clock it was to leave the dock. We packed up all our baggage and clothes—

Q. You are referring to the crew of the "Barracuda" when you say "we"?

A. Yes, sir. We packed up our clothes and went to the dock. We took the launch and went to the ship, and when we were aboard the chief mate of the "Barracuda" gets us all to get together so he could distribute our tickets amongst us, calling our names in rotation and giving us each a ticket,—a steerage ticket.

* * * * * * *

Q. Then I understand that a little later, two or three days on your voyage, the purser took up those tickets and gave you these steerage identification checks?

A. Yes, sir.

Q. Did you sign any ticket?

A. No, sir.

Q. None of the crew signed any?

A. No, sir.

Q. Of course, you didn't pay anything for these tickets that were given you?

A. No, sir, I did not.

Q. Well, you don't know that any one did?

A. No, sir.

Q. Do you know why, Mr. Iverson, the tickets were given you?

A. Well, it was on account that we were going home as passengers.

Q. Why was it that the "Mongolia" was giving you transportation irrespective of tickets; why were they sending you back to San Francisco?

A. On account that we was passengers, and our port of discharge was San Francisco, and they sent us home after we had been discharged from the Japanese. We was sent home as passengers to our port of discharge, San Francisco.

Q. Under your original contract?

A. Yes, sir.

(Trans. pp. 131-133.)

Q. Have you terminated your "Barracuda" contract?

A. I don't quite know what you mean by "terminate"?

Q. Ended it?

A. Ended my contract; no, sir.

Q. It is still in force?

A. Yes, sir.

(Trans. p. 134.)

Appellee PATRICK MURPHY testifies on cross-examination as follows:

Q. Were you paid any money in Yokohama?

A. Yes, sir; I got money in Yokohama.

Q. Who from?

A. From the agents.

Q. Agents of the Pacific Mail?

A. Yes, sir.

Q. On account of your articles, the "Barracuda" shipping articles?

A. Yes, sir.

Q. Under those articles you were to be returned to San Francisco?

A. Yes, sir.

Q. And when you got this ticket it was part of the fulfillment of that contract; it was part of their obligation to return you to San Francisco?

A. Yes, sir, to return us to San Francisco.

(Trans. pp. 183-184.)

Q. When you reach San Francisco you expect to draw your pay, do you not, under the articles?

A. Yes, sir.

Q. Is that so?

A. I expect to get my pay when I get to San Francisco.

Q. Pay for the time you spent in Honolulu?

A. Oh, I will see about that later.

Q. I would like to know whether you expect that or not?

A. Certainly I expect it.

(Trans. p. 189.)

* * * * * * *

Q. You are as well off here as you would be on the ship?

A. I would be in San Francisco now, if this thing hadn't happened.

Q. And you would not be drawing your pay under the articles?

A. Not in San Francisco. I could have got another job.

Q. You are being paid for this "Barracuda" job?

A. I haven't got it yet.

Q. You expect it?

A. Yes, sir.

(Trans. pp. 189-190.)

Appellee JOHN KENNEDY testifies on cross-examination as follows:

Q. Did you expect to collect money at the other end?

A. Yes, sir, for what was coming to me, for work I have done for the Pacific Mail Company.

Q. Are you working for the Pacific Mail Company?

A. Well, I don't know. It was chartered from the Pacific Mail Company.

Q. You have money coming under that?

A. Under that—I don't know which one it is.

Q. You signed articles?

A. Yes, sir.

Q. Were you paid anything in Yokohama by the Pacific Mail?

A. We were given money in Yokohama.

Q. Under those articles?

A. Under those articles we were given money in the Pacific Mail office. We signed our names.

(Trans. p. 215.)

Q. Did you pay out any money to the Pacific Mail Company in Yokohama?

A. No, sir.

Q. How did you get the ticket?

A. The captain gave it to us.

Q. What captain?

A. The captain of the "Barracuda", Capt. Curtis.

Q. You never paid for that ticket?

A. No, sir.

Q. Do you know why you got that ticket?

A. To take us to San Francisco.

Q. Yes,—but why?

A. To take us home—it was coming to us.

(Trans. p. 216.)

Q. As a matter of fact, you were given your transportation in Yokohama because the Japanese had captured the "Barracuda", and you were to be sent home to San Francisco, under your articles, by the Pacific Mail Company; is that not so?

A. Yes, sir.

Q. When you arrived in the City of Honolulu on

the "Mongolia" on the 27th, you were under pay, were you not?

A. Yes, sir.

Q. Of the charterers, or the Pacific Mail people?

A. Yes, sir.

Q. And when you reach San Francisco on this voyage that you contemplate making, you intend to receive or make a claim for the pay which is coming to you under these articles?

A. Yes, sir.

(Trans. p. 217.)

Q. Who suggested going to the company's office (the Pacific Mail Company's office in Honolulu)?

A. All of us suggested to go and see the agent.

* * * * * * *

Q. What for?

A. To see if we could not get some money that was coming to us from the "Barracuda".

(Trans. p. 234.)

Q. Mr. Kennedy, since October 27th to this time, you are claiming to be under the articles of shipment by which you made a voyage on the "Barracuda", are you not?

A. Yes, sir.

* * * * * * *

Q. You contend that you are entitled to pay under these articles?

A. Well, I should think we ought to, our destination is San Francisco.

(Trans. p. 236.)

Appellee GEORGE M. MORRISSEY testifies on cross-examination as follows:

Q. You shipped on a nine months' voyage from San Francisco to Siberia and return?

A. Yes, sir.

Q. And in Yokohama you drew money under these articles?

A. Yes, sir.

Q. And got this ticket under these articles?

A. It was not read out to us.

Q. But they were obliged to return you to San Francisco?

A. Yes.

Q. Do you consider that the "Barracuda" voyage is terminated?

A. Well, that is, *my working part on the "Barracuda"*.

Q. But you were still drawing money?

A. Yes, until I got back to San Francisco.

(Trans. p. 254.)

Q. You were obligated under these articles for a nine months' cruise?

A. Yes, sir.

Q. You count this as part of the cruise?

A. I don't exactly consider it that way.

Q. So far as you are concerned, you are going to draw money for it if you can?

A. Yes, sir.

(Trans. p. 260.)

Appellee THOMAS ROE testifies on cross-examination as follows:

Q. You shipped on a nine months' voyage from San Francisco to Siberia and return?

A. Yes, sir, to return to any part of the world, and signed on at San Francisco.

Q. When did you sign these articles?

A. On the 19th day of August.

Q. The ship was the "Barracuda", was it not?

A. The ship was the "Barracuda".

Q. And she was captured by the Japanese?

A. Yes, sir.

Q. And you were taken to Yokohama?

A. Yes, sir.

Q. There you were given money by the Pacific Mail agent on account of your articles?

A. Yes, sir.

Q. And you received a ticket from your chief officer that entitled you to passage from Yokohama to San Francisco?

A. Yes, sir.

(Trans. pp. 271-272.)

Q. You people wanted money (in Honolulu), didn't you, on your shipping articles?

A. Well, they wanted money on the contract, but he (the Pacific Mail Company's agent) refused them that.

Q. You consider the Steamship Company still bound under these articles, don't you?

A. Yes, sir.

Q. So that when you reach San Francisco you will put in a claim for your wages?

A. Yes, sir.

Q. Your articles have not expired yet, that is, the term of shipment?

A. No, sir.

Q. They don't expire for several months?

A. No, sir.

CHARLES A. MILLER, a witness called for *appellant,* testifies on cross-examination as follows:

Q. You were in the employ of the Pacific Mail Steamship Company at that time? (referring to the time of the arrival of the "Mongolia" in San Francisco.)

A. Yes, sir.

Q. How long had you been employed by the Pacific Mail Steamship Company?

A. I had been in the employ of the Pacific Mail Steamship Company about three years before that.

Q. Are you still in their employ?

A. No, sir.

Q. When did you leave their employ?

A. I left their employ the day we signed clear articles of the "Barracuda".

Q. That was when, Mr. Miller, as near as you can get the date?

* * * * * * *

A. It was November 6th, that we signed clear articles.

Q. Was the "Barracuda" under the control of the Pacific Mail, or had she been chartered?

A. She had been chartered by Barneson, Hibberd & Co.

Q. They had the control of the vessel?

A. I don't know whether they had control; all I know is they had charge of the vessel, but the Pacific Mail Company manned the ship.

(Trans. pp. 289-290.)

Francisco Guardado, a witness called by *appellant,* testifies as follows:

Q. You were paid off by the Shipping Commissioner, were you, here?

A. I was paid off here in San Francisco.

Q. By the Shipping Commissioner?

A. Yes, sir.

Q. Down at the Pacific Mail dock?

A. Yes, sir.

Q. With the other members of the "Barracuda" crew?

A. Yes, sir.

(Trans. p. 323.)

JOSE FERNANDEZ, another witness called by *appellant,* testified as follows:

Q. You were paid off by the Shipping Commissioner when you arrived in San Francisco, were you?

A. Yes, sir.

(Trans. p. 337.)

We submit that this evidence clearly establishes our contention that the relation existing between the appellant and appellees while the latter were on the "Mongolia", was not evidenced by the passage tickets given to these men, but was founded solely on the obligations growing out of the "Barracuda" shipping articles—an obligation and duty on the part of the Pacific Mail Steamship Company to pay wages to the crew of the Steamship "Barracuda" and return them to the port of shipment within nine months from August 22nd, 1905. The return to San Francisco by the Steamship "Barracuda" having been made impossible by reason of that ship's capture, it became the duty of the Pacific Mail Steamship Company to return these men by some other appropriate way. It placed them in hotels in the City of Yokohama (see evidence C. A. Miller, Trans. pp. 277-278), and eventually selected the Steamship "Mongolia" as a substituted means of return. Some thirty-odd members of the crew reached San Francisco on board that ship. These appellees did not, and for the sole reason that they

voluntarily left the ship en route, without the consent of the appellant, and under circumstances which made it impossible for them to return to the ship. This is our view of the case, irrespective of the question of whether these men had knowledge that Honolulu was an infected port, or knew of the quarantine regulation.

The appellant had no part in the circumstances that intervened to prevent a continuous passage from Yokohama to San Francisco on the Steamship "Mongolia". The status of the appellees as to the ship itself could of necessity have been only that of passengers (they being neither of the officers or crew of the "Mongolia"), but the fact of their being passengers could not and did not change their prior contractual relation towards the appellant. Their becoming passengers on the "Mongolia" did not defeat their right to wages from the appellant under the "Barracuda" articles, nor were they themselves relieved of duty towards the appellant, except only in so far as the performance to such duty was prevented or modified by the capture of the "Barracuda" and the changed conditions resulting therefrom.

This appellant, in furtherance of its duty to the crew of the Steamship "Barracuda", caused them to be placed on board the Steamship "Mongolia" for a continuous voyage from Yokohama to San Francisco. By a voluntary act of their own, unsanctioned by the appellant, six of the crew of the

"Barracuda" were prevented from making this continuous trip on the Steamship "Mongolia", one of these was returned on the Steamship "China", the remaining five stopping over to sue. Their quitting the ship at Honolulu, no matter with what intent, was an act done at their own peril, as far as appellant was concerned. It was nothing more than a circumstance that the appellant employed its own ship to convey these men to their port of shipment, and the situation is the same had transportation been obtained for them by a vessel of some other ownership. It is true that the owner of such other vessel could not have availed itself of the "Barracuda" contract as a defense, but certainly this appellant can, for the original contract could have in no way been changed or modified by an act which was but the carrying out of one of its terms, to wit: the return of these men to San Francisco.

Suppose these five appellants had voluntarily quit the "Mongolia" at Honolulu with the purpose of returning before she sailed, and had failed or been prevented returning in time. Could it possibly be held that appellant should respond in damages? And yet the circumstances of the suits at bar are not dissimilar. These appellants left the ship, and by so doing placed themselves in a position that prevented a return, for they had entered an infected port.

We respectfully submit, therefore, on this view the libel should be dismissed.

After these men had been left in Honolulu appellant still recognized a duty under the "Barracuda" articles, and did what it could to forward them to San Francisco on the next available steamer, but without success; the evidence on this point is as follows:

ALFRED IVERSON, Cross-examination.

Q. Have you been advised, Mr. Iverson, prior to bringing this suit; have you been advised that the Pacific Mail Company would send you to San Francisco on the Steamer "China"?

A. I have. By the agent of the Pacific Mail Company.

Q. Who told you that, Mr. Klebahn (agent of the Pacific Mail Company), this gentleman?

A. Yes, sir.

Q. What was Mr. Klebahn's statement to you, Mr. Iverson?

A. Well, we was at a window there talking to him, and told him that we was passengers left ashore by the Steamer "Mongolia", and he said that he already looked into the matter and he said that we would go home passengers on the next steamer—that would be the "China", sailing next Monday. Then I asked who is going to keep us while we are stopping here; I told him we had no money. He then said I would have to take care of myself.

Q. You would have to take care of yourself?

A. Yes, sir, we would have to take care of our-

selves. Then I said I would like to know why we can't draw some money that we have coming, and he said no, he didn't get no orders to give us any money.

Q. Is that practically all the conversation?

A. Yes, sir.

Q. Did you have any conversation later on with him about that matter?

A. No, sir.

Q. When was this conversation that you have related?

A. On the date the Steamer "Mongolia" sailed.

Q. On Saturday, the 28th?

A. Yes, sir.

Q. What time?

A. About—between 12 and 1 o'clock.

Q. Had you at that time met Mr. Davis (Proctor for appellees)?

A. No, sir.

Q. Were you told to come back to the office by Mr. Klebahn on Monday?

A. No, sir; I was not.

Q. Now, Mr. Iverson, have you received from any one, any proposition from the Pacific Mail Steamship people that included not only your transportation to San Francisco, but your keep while you were detained here?

A. No, sir.

Q. Now I understand that in the first instance,

when you went to see Mr. Klebahn, that was practically your proposition?

A. Yes, sir.

Q. You wanted to know about your return to San Francisco and about your keep while being detained, and Mr. Klebahn said you should go back on the "China"?

A. Yes, sir.

Q. You went to Mr. Klebahn, did you, at that time?

A. Yes, sir; I went to him to the office.

Q. And you felt that it was right for you that the Company should send you to San Francisco and keep you while here?

A. Yes, sir.

Q. Because you were under this contract in the "Barracuda"?

A. Yes, sir.

(Trans. pp. 135-6-7.)

Q. * * * * Are you quite sure that at any time after that (Saturday, Oct. 28th), Mr. Davis did not tell you that the Steamship Company would pay your fare, or give you transportation on the "China" and keep you while you were here?

A. I was told that after.

Q. By whom?

A. By Mr. Davis.

Q. When was that?

A. That was a few days after the "Mongolia" sailed.

Q. Before you brought suit?

A. No, sir.

Q. Didn't he tell you before you brought suit?

A. No, but I explained my case to the lawyer, to sue the company.

Q. Now, before swearing to the complaint (sworn to Monday, October 30th), did you not have that information, that the company would send you back on the "China"?

A. Before swearing to the complaint?

Q. Yes, that the company would send you back, and in the interim would pay your keep as well here.

A. No, I don't quite believe I had.

Q. You don't think you did?

A. I am not quite positive about that.

Q. Now, tell us when and where it was you did have that information given you?

A. At Chillingsworth's office.

Q. When—in the forenoon or the afternoon?

A. In the afternoon.

Q. You can't remember the date?

A. No, sir.

Q. What did you say to that proposition?

A. I said it is funny that when I first asked the agent he told us we would have to look out for ourselves, and now that he found out that we are going to sue, he would keep us now; I tried to find out why he wouldn't do it when first asked, and save us a lot of trouble.

Q. You say it was the afternoon you were going to sue; at that time you hadn't sued.

A. I am not sure whether I had sworn to the complaint at that time.

(Trans. pp. 158-9-60.)

* * * * * * * * * *

Q. Well, you say that at that time was brought that was all (you) claimed; if you could have got your transportation and keep you would have been satisfied?

A. Yes, sir, and my wages gone on till I got to San Francisco.

(Trans. p. 161.)

Q. I understand, Mr. Iverson, that you have been stopping at the Sailors' Home?

A. Yes, sir.

Q. How did you learn where it was?

A. Well, from some people ashore here, some sailor men.

Q. Who were they?

A. There was one man I know, whose name was Shenan; he was stopping here in Honolulu.

(Trans. p. 163.)

Q. Did any one else tell you about the Sailors' Home?

A. No, sir.

(Trans. p. 164.)

Q. Where did you leave your baggage when you went into the steamship office?

A. Outside of the company's office.

Q. Sheenan—he stayed outside?

A. Yes, sir.

(Trans. p. 164.)

* * * * * * * * * *

Q. Now, after you left the office at that time, did you again see Sheenan?

A. After I left the office Sheenan was still there, stayed there till we came back.

(Trans. p. 165.)

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At this point it is interesting to read Mr. Klebahn's testimony on this matter:

Q. When, Mr. Klebahn, after Friday, did you first have anything to do with either these libelants or any agent or attorney of the libelants?

A. After the sailing of the "Mongolia", about twelve o'clock noon Saturday.

Q. Relate the interview.

A. There were several of the steerage passengers who were left behind, men that I remember, Iverson and Miller, came to the window and asked me what would be done with them. I told them that I had looked into the matter, and that I would send them up on the "China", the very next boat that would leave, on or about November 6th. They told me then they did not have any money, and I told them it was very unfortunate, but I could not help

it, it was not our fault, that they were left behind I further stated to them that I was very busy, on account of the Steamer "Coptic", which was in port at the same time, which was scheduled to leave for the Orient at three o'clock; to come back again and I would consider the matter further.

The COURT: What time in the afternoon was this?

A. About noon; after I came in from the "Mongolia", with which steamer I had gone outside.

Mr. MCCLANAHAN: Q. At that time, did they leave the office?

A. They left without saying anything further.

Q. Do you know Mr. Charles F. Chillingsworth?

A. Yes, sir.

Q. Did he make a visit to your office?

A. He did.

Q. Before or after the visit of these men?

A. After.

Q. Well, relate the conversation that took place between you and Mr. Chillingsworth.

A. He said what was going to become of these men that were left behind from the "Mongolia". I repeated to him that I was going to send them up on the "China", but as to providing for their eatables, etc., and sleeping, while here, I could not give him an answer at that time, as I stated before. I was too busy, on account of the "Coptic", but asked him to come again and I would let him know definitely what I would do.

Q. Why was it that you had not made up your mind as to whether or not you would provide their keep while here?

A. Because our instructions as to steerage passengers are they are not allowed lay-over privileges; secondly, if they are not allowed lay-over privileges they are not allowed any board and keep while in port, if they had stayed over. I took it on my own responsibility to send them up on the "China" and was taking chances of getting a reprimand from the head officer, but I was going to take the chance of bearing that here because they were marked on the list which I got from the purser as members of the "Barracuda" crew.

Q. And that is why you were undecided as to their keep?

A. Yes. As soon as I had more time I would look into the matter.

Q. When Mr. Chillingworth left your office he had from you a proposition to send them on the "China", and a request that he return for further suggestions as to their keep?

A. Yes, sir.

Q. Did he acquiesce to that?

A. He didn't say much, he went away and I didn't see him again.

Q. Who next did you see with reference to these "Barracuda" men, and their transportation and keep while here?

A. I next saw Capt. Bray, of the Sailors' Home.

I think it was on Monday morning about 9 o'clock, and I asked—no, that isn't the next that I saw. Next I saw a man who was standing outside of our office door when I came back from the custom house with the Captain of the "Coptic"; I should judge that was about half past one in the afternoon, October 28th, Saturday. There was a pile of baggage placed at the corner, and this man was standing with it, evidently watching it.

Q. Whose baggage was it?

A. This man told me it was the baggage of the men of the "Barracuda" who were left behind from the "Mongolia". I approached this man and asked him whether he was one of the people left behind. He said no. I asked him whether he was watching this baggage, whether this belonged to these men; he said yes. I said, "Will you see these people again?" He said, yes, they were coming back. I told him, "If you see them again request them to go to the Sailors' Home and come back to our office on Monday morning, and I will tell them definitely then what I am going to do." On Monday I met Captain Bray, of the Sailors' Home, in the office. He was collecting some sailor notes at our cash window. I asked him if these people had come to the Sailors' Home; he said yes. I asked him, I informed him then that so far as I had heard they were going to sue the Pacific Mail Co., but if there was no trouble I was going to be responsible for the bills. He said all right.

About an hour later Mr. George Davis came up to our ticket window—

Q. Is that the proctor in this case, for the libelant?

A. Yes. Came up to our ticket window with steerage checks, numbering six, I believe, and told me that he was representing these people what was going to be done with them. I told him that I had made up my mind on account of the conditions they were under, being members of the "Barracuda's" crew that I was going to send them up on the "China" on the steerage ticket issued by the purser of the "Mongolia", and provide for their board and keep in the Sailors' Home until the arrival of the "China". That further, in order to secure transportation on the "China" they had to live up to the rules and regulations in regard to outgoing quarantine. Mr. Davis told me then, whether that would be all right and if I wouldn't pay a reasonable attorney's fee. I told him I hadn't engaged any attorney, and could not possibly pay any attorney's fee. He said he had gone to some trouble, and was expecting some money for it, and I told him he had to look for remuneration to his clients. After that he has not been in the office again, and on Tuesday I was served with the libel of Iverson, Alfred Iverson.

Q. That was on Tuesday, October 31st?

A. Yes.

(Trans. pp. 422-427.)

This is corroborated by CAPT. BRAY, Superintendent of the Sailors' Home, who testifies as follows:

Q. Did you entertain at your place, Captain. some members of the crew of the "Barracuda" about October 28th last?

A. I did.

Q. Under orders received from Mr. Chillingworth, did you not?

A. Not at first.

Q. Tell us the circumstances under which they first came to your place?

A. On the evening of October 28th they came in and reported that they had been left by the "Mongolia", that they were part of the crew of the "Barracuda" and were on their way home in the "Mongolia"; said they had been ashore and were not permitted to return to the ship; they had nowhere to go and no place to sleep, and wanted to know if I would take them in. I had a little conversation with them in regard to the "Barracuda", and knowing that she was a vessel in the same employ I asked them if they were passengers, or if they joined as part of the crew. They said passengers, and they wanted to go on her but they wouldn't be permitted to, or hadn't been permitted to. I told them that as long as they had nowhere to sleep they could come in for a night or two, at least, until further developments were made. They remained there that night and I think one or two nights; after that Mr. Chillingworth sent me

orders to take them in at his expense, which I did. They remained there till they went away. One of them went on the "China", I think. I was in Messrs. Hackfeld & Co.'s one day, to collect some bills, and Mr. Klebahn informed me that if they were willing to return—

* * * * * * * * * *

The COURT: Q. Mr. Bray, what day was that, that you went to Heckfeld & Co.'s to collect bills, and has this conversation with Mr. Klebahn?

A. I couldn't say what day it was; it was the 28th that they came there, I think, that was Saturday, and this was the following Monday, if I am not mistaken.

* * * * * * * * * *

A. He (Klebahn) stated that they were ready to send the men on by the "China" and that if they were willing to go they would be responsible for their board and lodging. I was looking out for the security for the Home; *I made this known to them.* Seamen going through generally like to talk over their affairs, the past voyage and treatment they have had, and very often advise with me as these men did at that time, they asked me what I thought of the case, I told them I thought the best thing they could do was to go right on, as soon as they could. That was all that was said at the time; afterwards they informed me they had concluded to remain, and have the case tried.

Q. As a matter of fact, Capt. Bray, has not H.

Hackfeld & Co., the agents of the Pacfiic Mail Steamship Co., reimbursed you or paid you for the board and keep of some of these men, under the offer made by Mr. Klebahn in the office of the company that morning?

A. One man that went on the "China" that Saturday after.

The COURT: Q. What was his name?

A. Miller.

(Trans. pp. 396-399.)

When it is understood that the libels of John Kennedy and Patrick Murphy were not filed until November 1st, and those of Thomas Roe and George M. Morrissey on November 2nd; the fact that these men were offered their transportation to San Francisco on the "China" and their keep during their stay in Honolulu before suits were brought, seems established, at least, that the offer was made to their proctors. In this connection we submit the following evidence of Mr. Klebahn:

Q. Mr. Klebahn, did you, after the six libels had been filed, have any communication with the men with reference to a settlement with them?

A. Yes, sir, I did.

Q. Was it in writing or verbal?

A. It was in writing.

Q. I hand you a book, what is it?

A. It is our copy book from the office.

Q. Will you please turn to the writing, if it is

copied there, referred to. (Witness does so.) The letter is dated November 4th, addressed to each of the libelants. I ask you to identify it. I ask you to turn to page 305, and ask you what you find?

A. A copy of one of the letters which was addressed to one of the six libelants in this case, on November 4th, and which was handed to them, personally, at our ticket window, on the afternoon of November 4th, in the presence of Mr. Reilly, each of the libelants receiving one of these letters.

Mr. McClenahan: I will read the letter:

"H. Hackfeld & Co., Ltd.,
Honolulu, November 4th, 1905.

Mr. Thomas Roe, Honolulu, T. H.

Sir:—

On last Monday morning, October 30th, a. c., we notified your attorney, Mr. George A. Davis, that we would give you transportation on the S. S. 'China', sailing from this port for San Francisco on or about the 6th day of November, on the steerage check held by and issued to you by the purser of the S. S. 'Mongolia', and in the meantime would pay for your keep at the Sailors' Home in this city, up to the sailing of the S. S. 'China' for San Francisco.

We made this offer on information that you are under shipping articles with the P. M. S. S. Co.'s S. S. 'Barracouta,' which require your return to San Francisco.

From information this day received we have reason to believe that our offer was not communicated to you until after suit had been brought for damages against the Pacific Mail S. S. Co. We now renew our offer, and advise you that if it is accepted you must report to this office at 9 o'clock a. m. tomorrow, Sunday, November 5th, a. c., to learn the quarantine regulations that must be complied with before passage can be given on the S. S. 'China'. If you decline this offer or fail to so report, then for the Pacific Mail S. S. Co. or the charterers of its S. S. 'Barracouta' we notify you that you have broken the articles under which you were originally shipped at San Francisco, and that in consequence you will have forfeited all rights for wages thereunder.

Yours truly,

(Sgd.) H. Hackfeld & Co., Ltd.,

F. Wm. Klebahn, Secretary,

Agents Pacific Mail S. S. Company "

(Trans. pp. 429-431.)

It will be remembered that Harry Miller was a sixth man to file a libel against the appellant, but his suit was discontinued after the receipt of the above letter, and he left for San Francisco on the S. S. "China".

In leaving this first point of defense, we cannot refrain from suggesting that the record in this case reveals an uncommendable activity on the part

of the legal advisers of these men to prosecute this litigation. The evidence is clear that both before and after the suit brought, the only thing which stood in the way of an amicable adjustment of the matter was the payment by the Pacific Mail Steamship Company of an attorney's fee. As early as the Monday following the Saturday on which the "Mongolia" sailed from Honolulu, these legal advisers had secured an agreement from the appel lees to share the spoils. (See "Libelees", Exhibit A, page 546 of the record.)

(2.)

In our argument on the second of appellant's theories of defense, we assume that the contractual relations existing between the appellant and appellees arose through the issue to the latter of tickets calling for a continuous steerage passage from Yokohama to San Francisco on the S. S. "Mongolia".

On this theory we ignore entirely the contractual relations arising out of the "Barracouta" articles, and treat the appellees as ordinary steerage passengers holding regular tickets. Our defense on this theory is, that the record shows that these steerage passengers not only left the ship with knowledge of the quarantine regulation, but also that after leaving it with this knowledge, they refused to accept of a modification of the regulation made for

their benefit by the health officers, which, if complied with, would have permitted their being received on the ship again. One of their number (Harry Baker) did comply with these conditions and was received back on the ship, but the remaining six, including Miller, did not.

As we understand the matter, the case presents no disputed point of law, for it seems to be conceded that appellee's suits fail, if, with knowledge of the health regulation, they voluntarily left the ship and entered an infected port. The question, therefore, is wholly one of fact, necessitating an examination of the entire record, and for this reason the Court will pardon us if, in our attempt to assist to a right decision, we enter upon a somewhat extended examination of the evidence.

It is well known that in an ascertainment of truth where men are at variance in their statements concerning a fact, it is a pretty safe rule to consider the probabilities. The probative fact here is, did these appellees have notice of the quarantine regulation before leaving the ship? Each man of them says "no." In the first place, it must be understood that for them to have said "yes" would have defeated their suits, and we suggest that under the circumstances they were advised that it would. So, if they are found to have stated an untruth, there was a motive for it. On the other hand, much of the appellant's positive evidence on this point is disconnected with any mo-

tive, and all of it is substantiated by the probabilities of the case.

The fact of a ship's quarantine at the end of a long voyage is of as vital curiosity to her passengers as any other general fact well could be A passenger is looked upon with wonder, who, at the end of days of confinement at sea, is indifferent to opportunity for stretching his legs on shore. And probably no news is disseminated more naturally and quickly among a ship's list than that the long looked-for opportunity to land is to be denied, through quarantine regulations. The probabilities are that news of such a nature needs but little publication to make it general.

Out of some twelve witnesses called by the appellant, all members of the "Barracouta" crew, testifying that notice had been given that steerage passengers should not go ashore, it is to be noted that four of them could not speak or understand the English language, and yet they had notice of the regulation, even though it was given in a language foreign to them. Here again we suggest that if these Spaniards, Louis Alonzo (Trans. p. 324), Edward Rosas (Trans. p. 326), Joseph Medina (Trans. p. 331) and Jose Fernandez (Trans. p. 335) of the "Barracouta" crew received notice of the regulation, the probabilities would seem to point to knowledge of the requirement on the part of the appellees, who were all fairly intelligent American citizens. In fact, we believe that their

Americanism had much to do with their disregard of the quarantine regulation, for in the regulation there was a seeming discrimination made between cabin and steerage passengers, which these men as freeborn American citizens, could not understand or see the justice of. Our "equality before the law" doctrine gave these men rights and privileges which to their minds could not be abridged or taken from them by a mere health regulation applicable to them but not to others. And they belonged to a class that did not propose being discriminated against. They denied *all* knowledge of the regulation, and therefore were forced to deny, on cross-examination, the possession of this spirit of resentfulness at the evident discrimination, but we submit that a close examination of their evidence, read in the light of other evidence in the case, will lead to the conclusion that it was knowledge that they were being discriminated against that really led these confessedly penniless men to defy the health officers and go ashore.

Here again we submit to the Court the probabilities in order to test the truth of the evidence given by these appellees on this point.

Talk of discrimination necessarily implies knowledge that cabin passengers could land, but steerage passengers could not—necessarily implies knowledge of the quarantine regulation. Alfred Iverson freely admits that he was conscious of the discrimination at a time subsequent to his leaving

the ship, but he evidently saw the drift of the cross-examination on the subject of a prior knowledge, and was very careful.

Q. Did you know, Mr. Iverson, at that time, on Saturday, prior to the sailing of the "Mongolia", did you know then why you had been refused permission to go on the steamer "Mongolia"?

A. I was told afterwards.

Q. I say at the time you had the conversation with Mr. Klebahn, did you know then why it was you could not go on the steamer "Mongolia"?

A. Yes, sir.

Q. You got this information after you came ashore?

A. Yes, sir.

Q. What was the reason, Mr. Iverson, as you knew it?

A. As we knew it, they said it was quarantined.

Q. That is, your information was you were refused admission to the ship, because the ship was quarantined?

A. I don't know whether the ship, or the town, or it was me.

Q. You knew there was a quarantine regulation which prevented your going on the ship?

A. Yes, sir.

Q. So that you did not attribute the company's refusal to let you go on the ship to any act of the company; the company was not to blame for not letting you go on the ship?

A. I don't know who was to blame, but there was a quartermaster who stopped me at the gate

Q. I am now referring to the time when you had information that the reason why the quartermaster stopped you—at the time you learned that quarantine regulations prevented your going on the ship; at that time you did not then attribute to the company the wrongful refusal to allow you on board?

A. No, sir.

Q. You knew it was the quarantine rule that the company was enforcing?

A. Well, I was not clear either way, whether the company was following the quarantine doctor's orders or not; I don't know nothing about that.

Q. Well, what did you know about that quarantine?

A. I don't know nothing at all about it, only that I was told afterwards that we was refused.

Q. Well, I am talking now about the time when you did learn something about it; what was it that you learned; was it that steerage passengers were not allowed ashore and cabin passengers were?

A. Yes, sir.

Q. You saw no reason why there should be a discrimination?

A. No, sir.

Q. But you didn't think—you have never thought, have you, that the company was making this discrimintaion?

A. Well, I didn't know who was.

Q. But whoever was to blame, you thought that the steerage passengers should not be discriminated as against the cabin passengers?

A. Yes, sir.

Q. Did you express this sentiment of yours to any one at any time?

A. We have talked about it, but we all seemed to think the same thing, that it was funny cabin passengers could go ashore and we couldn't.

Q. Did you talk about it among yourselves?

A. Yes, sir.

Q. Well, now, when you first met opposition to your return to the ship, didn't you then say that you didn't think it was fair, or something like that that you should be discriminated against?

A. I just said, it is funny that the cabin passengers should go in and out of the dock, and we can't.

Q. You told that to the quartermaster?

A. Yes, sir.

Q. At the gate?

A. Yes, sir.

Q. Had you seen the cabin passengers going on the steamer?

A. Yes, sir.

Q. And you thought that as they could get off you could get off, and that that was your right?

A. Yes, sir.

Q. Did you get off with the cabin passengers?

A. There was probably one or two ahead of me; I couldn't say whether cabin passengers or not; I didn't see their faces.

Q. Did you and your shipmates go off in a bunch?

A. No, sir; there was three other men besides me came down together.

Q. Who were they?

A. One was Kent, Kennedy, Morrissey and Murphy.

Q. They have also brought libels against the ship?

A. Yes, sir.

Q. Well, now, had you known of any other of the steerage passengers that had gone off before that?

A. Yes, sir. There was a steerage passenger gone off before we did.

Q. I understand that you docked about half past 11?

A. Between 11 and half past 11.

Q. And did you get your lunch before you went ashore?

A. Yes, sir.

Q. What time did you get your lunch? What time did they have lunch on board?

A. 12 o'clock.

Q. Then I understand you went off about half past 1 or 2 o'clock?

A. No, sir; about half past two or three o'clock.

Q. Wasn't there a good deal of talk about this discrimination between the cabin passengers and steerage passengers, a good deal of feeling among the steerage passengers?

A. No, sir; there was nothing said to us about going ashore, when lying at the dock.

Q. I say, wasn't there a feeling that there was a discrimination allowing the cabin passengers to go ashore?

A. Well, I don't know whether is was or not, sir.

Q. You would have known of the feeling, wouldn't you; was there any such among your immediate shipmates?

A. Not that I know of.

Q. You say the cabin passengers came ashore?

A. Yes, sir.

Q. And yet you didn't feel that there was any discrimination?

A. I thought I had as much right to go ashore as they did.

Q. Didn't you express that?

A. No; I said there is some of the cabin passengers going ashore and they asked if I was going ashore and I said yes, going ashore for a while and take a walk, and I got dressed, put my shoes on.

Q. Didn't your shipmates express feeling that it was not right to discriminate against the steerage?

A. No, sir.

Q. Did not?

A. No, sir.

Q. How long had you been on your voyage?

A. From Yokohama to here, about 9 days. A little over 9 days.

Q. You say that there was no objection made to your leaving the ship by anyone?

A. No, sir.

Q. Where were you, between the hour of finishing your noon-day meal and half past 2 and 3 o'clock?

A. I was aboard the steamer, down to our berths, and part of the time I was up on deck.

Q. What part of the time were you down below?

A. Right after dinner time.

Q. How long did you stay there?

A. Oh, probably till about a little after 1 o'clock.

Q. And then you came on deck, and remained there until half past 2 or 3?

A. No, sir; I stopped there a short while, then I went below and put on my shoes and coat and hat and went ashore.

Q. Then you remained on deck from 1 o'clock until nearly the time of going ashore?

A. Yes, sir.

Q. You remember the quarantine doctor coming on the ship?

A. In the stream I do.

Q. That is, before your lunch?

A. Before we had dinner and before we got to the dock.

Q. What do you mean by the stream?

A. Well, that is lying outside the channel here.

Q. Before you got into the channel at all? Did you see any of the ship's crew after the examination of the steerage passengers?

A. Yes, sir.

Q. The "Mongolia" crew?

A. Yes.

Q. Who of the crew did you see?

A. They were all together.

Q. Before she docked?

A. I saw all.

Q. Did you see the steerage steward?

A. *I seen the steerage steward before she docked.*

Q. And after the doctor had inspected the steerage passengers?

A. Yes, sir.

Q. What is his name?

A. I don't know.

Q. You know his face?

A. Yes, sir.

Q. How many times did you see him? After he passed the doctor and at the time of your docking?

A. Probably about twice, that was around dinner time.

Q. Well, you ate your lunch at the dock, didn't you?

A. Yes, sir.

Q. Well, I am talking about before that, between the hour of inspection by the medical gentleman and the hour of docking, at half past eleven, did you see him a couple of times during that interval?

A. Yes, sir; I see him on deck.

Q. You went on deck?

A. Yes, sir.

Q. With your gang, in a bunch?

A. No, scattered along the deck.

Q. Mr. Iverson, why didn't you leave the vessel sooner than you did?

A. Well, I was in no hurry about going ashore; I thought I had lots of time to go ashore.

Q. You had the opportunity of leaving as soon as she was docked?

A. Yes, sir.

Q. But you preferred to wait until half past 2 or 3?

A. Yes, sir.

Q. Wasn't that because of a rumor afloat?

A. No, sir.

Q. You don't know of the kind of a rumor I refer to, do you?

A. No, sir.

Q. Well, a rumor afloat that the cabin passengers were allowed ashore and the steerage would not be?

A. No, sir.

Q. Now, have you any reason, aside from your statement, why you remained on the ship until half past two or three, before going ashore?

A. No, sir.

Q. I understand you went ashore with the bunch?

A. No, sir; there were four of us went ashore.

Q. Well, how many do you consider a bunch; more than four?

A. Well, no, I guess four is a bunch.

Q. Now, there were other people besides your bunch, going ashore at the time?

A. Yes, sir. Ahead of us.

Q. Were they steerage?

A. I don't know.

Q. You had seen, prior to your going ashore, other people going ashore?

A. Yes, sir.

Q. What were you doing while you were watching the other people going ashore?

A. I was standing by the port, and was looking on the dock, and I happened to look along the gangway and I seen passengers going ashore.

Q. How many, from the time the vessel docked up to the time of your going ashore? You saw people going ashore in that manner?

A. Yes, sir.

Q. And all you did was to watch them?

A. Yes, sir.

Q. Who was the first steerage passenger ashore?

A. One of the coal passers of the "Barracuda".

Q. What was his name?

A. I don't know his name.

Q. Is he here in town now?

A. No. sir.

Q. When did this coal passer go ashore?

A. He went ashore about 1 o'clock, probably a little after 1 o'clock; I should say 1 or near there.

Q. How do you know he was a coal passer?

A. I knew he was a coal passer on the "Barracuda".

Q. He was dressed as a coal passer?

A. No, sir.

Q. So up to 1 o'clock you had seen no steerage passengers go ashore?

A. I said 2 o'clock.

Q. So up to 2 o'clock you had seen no steerage passengers go ashore?

A. No.

Q. Had you seen cabin passengers go ashore before that?

A. Yes, sir.

Q. As a matter of fact, as soon as the vessel docked cabin passengers began to go ashore?

A. Yes, sir; as soon as the gangway was put up

Q. Do you know of any reason why the steerage passengers did not begin to go ashore until two o'clock?

A. No, sir.

Q. You still didn't hear any rumor, and you have no reason to offer why they didn't go ashore till 2?

A. No, sir.

Q. They had the opportunity, just as the cabin passengers?

A. Yes, sir.

Q. While you were leaving the ship to go ashore did you at that time receive any notice of this quarantine regulation?

A. No, sir.

Q. Did you receive any notice that you should not go ashore?

A. No, sir.

(Trans. pp. 137 to 147.)

JOHN KENNEDY, on this point, testifies as follows:

Q. As soon as she docked you left the ship?

A. No, sir; between half-past two and three o'clock.

Q. The cabin passengers were going ashore?

A. They had gone ashore.

Q. Why didn't you go when they went?

A. We went after they went.

Q. You left immediately after?

A. No, sir, not immediately.

Q. Why didn't you?

A. We weren't ready.

Q. What were you doing?

A. Nothing—we were on deck.

Q. Why were you not ready?

A. I don't know; we were in no hurry to be ready.

Q. What preparation had you to make?

A. Had no preparation at all.

Q. Then you were ready, were you not?

A. Not quite ready; we washed and one thing or the other, washing our faces.

Q. How long were you washing your faces before you went ashore?

A. I guess we were gone 10 or 15 minutes after the cabin passengers left.

Q. Are you in the habit of washing your face after lunch?

A. No, sir, not always.

Q. Did you go down the same gang plank as the cabin passengers?

A. Yes, sir.

Q. Who was at the head of the gang plank?

A. The quartermaster and two officers; I don't know whether in the Immigration Service or the Custom-House.

Q. Had you known this quartermaster?

A. Yes, sir.

Q. He knew you?

A. No, sir; he didn't know me.

Q. You knew his face—had learned it on the voyage?

A. I seen him on the voyage, yes, sir.

Q. Did you not know that the steerage steward had told the steerage passengers they were not allowed ashore?

A. No, sir; never knew nothing about it.

Q. Don't know it to this day?

A. No, sir; I don't know it to this day, till after the ship was gone. When we were ashore we heard it.

Q. On the ship you had heard it?

A. No, sir; no one said a word.

Q. Perhaps you were down below, washing?

A. No, sir; I was on deck.

Q. You were on deck with the other steerage passengers?

A. Yes, sir.

Q. So that if that notice was given, if any notice was given at all, you could have heard it?

A. Yes, sir, I could have heard it.

(Trans. pp. 218-220.)

* * * * * * * *

Q. Didn't you hear some talk on board the "Mongolia" among the steerage passengers about discrimination being made against the steerage passengers?

A. No, sir; I never heard any talk about discrimination.

Q. You didn't think there was any?

A. No, sir, I didn't see why there should be any.

Q. Did you ever have it explained to you why some of the steerage passengers didn't go ashore?

A. No, sir.

Q. Did you not think it was strange?

A. No, sir, I didn't think so.

(Trans. p. 238.)

On the other hand, here is the evidence of CHARLES A. MILLER, the "Barracuda's" carpenter, on this point, called by the appellant:

Q. Where were you standing at the time the different steerage passengers went ashore?

A. I was standing up on the top deck looking ashore. I was near the gangway where I could see every one going ashore.

Q. Could you hear any conversation going on at the gangway?

A. Yes, sir; the steerage steward told them not to go ashore, and they told him that it was their business and that he had nothing to do with it.

Q. Where was the steerage steward at the time that the steerage passengers told him that, Mr. Miller? Where was the steerage steward stationed?

A. The steerage steward was stationed at the gangway.

Q. And you heard him telling them not to go ashore?

A. Yes, sir, I heard him telling them on several occasions.

Q. Did you hear him telling them also standing at the gangway?

A. Yes, sir.

Q. And what was their answer?

A. They told him that he could not stop them from going ashore.

Q. Do you know whether or not there was any talk among the steerage passengers and the crew of the "Barracuda" after the word was passed that there was sickness ashore and that they should not go ashore?

A. Well, it came out about this when they heard that the cabin passengers were allowed to go ashore They thought that they had a right to go ashore too.

Q. Did they say that?

A. They said that.

Q. To whom did they make these remarks?

A. Amongst themselves.

Q. There was considerable dissatisfaction, was there not?

A. Yes, sir.

Q. Between the members of the steerage, in which they said that there was discrimination between the cabin passengers and steerage passengers?

A. There was.

(Trans. pp. 284-285.)

And HARRY JENSEN, Quartermaster of the "Barracuda" also testifies on this point as follows:

Q. Did you see any other of the "Barracuda's" men on board after you were refused?

A. Yes, sir.

Q. Did you have any talk with them about why?

A. Yes, sir.

Q. What was the general trend of the conversation?

A. They said all the steerage passengers were stopped on account of the black plague. So I said: "Why can the first-class passengers go ashore, and they refuse the steerage passengers? I cannot see why we are any lower than they are."

Q. That was the general discussion among the steerage passengers?

A. Yes, sir; that was the general discussion.

(Trans. p. 305.)

CHARLES TROME, the steerage steward of the "Mongolia", says on this point:

Q. On your arrival off the port of Honolulu, what happened on board the ship?

A. We went through quarantine, and after that I got orders from the purser to tell the European steerage that nobody was allowed to go ashore, and if they would go ashore they couldn't come back on the ship.

Q. Acting under that order, what did you do?

A. I went to the steerage passengers, and told them the orders I got from the purser.

Q. How, generally, did you go among the steerage passengers?

A. Well, they wasn't satisfied; they commenced to talk to each other that they couldn't go ashore.

(Trans. p. 352.)

* * * * * * * *

Q. Did you hear, in the presence of this man who went ashore, this man whom you identified, Mr. Iverson, the quartermaster, take any part in the conversation?

A. Yes, sir. He did just as much as I did; tried to stop them, but couldn't.

Q. You mean to say you used any physical force, or simply spoke to them?

A. I couldn't use any force; I saw it wouldn't take very much to throw me down the gangway. I went to the center of the gangway and told them, and they pushed me aside and they came anyhow;

they said they had just as much right as the first-class passengers.

(Trans. p. 355.)

R. L. Halsey, a U. S. Immigration Inspector, testifies as follows on this point:

Q. On the ship did you meet any of the crew of the "Barracuda"?

A. I met the sailors in the steerage.

Q. Will you please tell the court what conversation you had with these men at that time?

A. I went twice in the performance of my duties to the steerage, and on my second visit the sailors evidently took me for some officer connected with the passing of the ship—

Q. You mean Marine Hospital Service?

A. Yes, and wanted to know if they could go ashore, and one of the number stated they were Pacific Mail men, and remarks were made in regard to discrimination in favor of the cabin passengers—

(Trans. p. 404.)

George S. Curry, acting Chinese inspector of the U. S. Immigration Service, testifies on this point as follows:

Q. Subsequently, Mr. Curry, did you have any conversation with any steerage pasengers on the Steamship "Mongolia"?

A. I remember that sometime after that, perhaps less than half an hour,—it was a few minutes,

ten or fifteen minutes,—I was standing at the head of the gangway on the deck of the ship, and, while waiting there, I was waiting for one of the interpreters, there was a man, a white man, evidently a seafaring man of the same character as these others; he came up to me and I couldn't give the exact conversation, of course, he evidently took me for a quarantine officer—I had on a uniform then—and spoke; he said: "I want to go on shore." I told him the port was in quarantine, and the steerage passengers were not allowed to go on shore; the cabin were. He intimated to me, in forceful language, that he was a white man, a citizen, and had as much right to go on shore as fellows in the cabin. He stood around, and I saw him going down the gangway.

Q. From what he said, and the manner in which he approached you, can you state whether or not he had knowledge that the port was in quarantine when he approached you?

A. Well, he came to me with those words on his lips, that he thought it was an injustice that he should be kept on the ship.

Q. Did you inform him you were not a Marine Hospital man?

A. I told him I was an immigration officer.

Q. It was after he went down the gangway?

A. Yes, sir.

Q. Do you know who these men were, that went down in the first instance, down the gangplank?

A. I was informed that they were members of the "Barracuda's" crew; they were seafaring men; I could swear to that of my own knowledge.

Q. Do you know who this single man was that you spoke to?

A. He was the same class as these other men.

(Trans. pp. 410-411.)

On the question of probabilities, we submit that in view of all the circumstances, they point to knowledge of the discrimination made between steerage and cabin passengers on the part of the appellees before they left the ship, and, therefore, knowledge of the regulation itself. This brings us to a review of the direct evidence of notice given to these men before quitting the ship.

The quarantine regulation was promulgated by Dr. Wm. C. Hobdy, Commissioned Officer of the Public Health in the Marine Hospital Service of the United States, in charge at Honolulu, at the time, under circumstances best explained by the Doctor himself in his direct examination.

Q. Will you please tell the Court the condition of this port, from a health standpoint, at the time the "Mongolia" arrived?

A. At this port, on the 27th of October, 1905, beginning with October 14th, or thereabouts, up to, and until the arrival of this vessel, or the day before her arrival, there had been several cases of plague in Honolulu, fatal to the number of ten. The cases

had occurred chiefly in the Asiatic part of the city, and four of these cases had been sick some days before the local authorities could get any report about their illness, whatever, so there was no limit to the number of people who came in or out of the rooms of these sick persons and were exposed to infection, and in two of the cases they died immediately prior to the arrival of the "Mongolia"—the cases after a sickness of three or four days, were found dead, and that was the first notification that any of the health authorities had that such existed, and nobody knows still how many different people may have been in and visited them and been exposed to the infection. All that is known is the names, locality of the death and the cause of their death, and approximate length of illness, which was three days in one case and four days in the other.

Q. In consequence of the condition prevailing here at the time you mention, what was done, if anything, by you as quarantine officer for the United States, with respect to incoming and outgoing steamers?

A. The different deaths having occurred as I have stated, in the preceding ten days, made it necessary for steps to be taken at this port in order that vessels clearing from here for San Francisco, or other coast ports, should be treated in such a manner that we could certify that they were free from infection or the danger of having the same, or else they would be held in quarantine on arrival at the

various coast ports—San Francisco, San Diego, Port Townsend, and others, up and down. Owing to the conditions being such, I had, on the 25th or 26th of that month, put in force certain quarantine regulations which, if obeyed by the vessels clearing from San Francisco or other coast ports, would enable them to be certified by me as being free from infection, and upon receiving such certificate, or bill of health, the quarantine authorities, at the mainland ports, would pass the vessel without delay for inspection, in the city.

Q. Did you give such promulgation of the rules or regulation to the agents of the Pacific Mail Company here?

A. I did.

(Trans. pp. 373-374-375.)

Upon arrival of the Steamship "Mongolia", the regulation requiring *inter alia,* that the crew and all steerage passengers be refused permission to come on shore, was communicated by Mr. Klebahn, acting for H. Hackfeld & Company, Ltd., the agent of the Pacific Mail Company, to the captain and purser of the S. S. "Mongolia", before the ship had reached her dock, and in Mr. Klebahn's presence the purser called the steerage steward, Charles Trome, and directed him to immediately notify the steerage passengers of the regulation.

The question now for decision on a conflict of evidence is: did Trome so notify the appellees, or did

the appellees have notice of the regulation from any source prior to leaving the ship?

On direct examination, this man Trome, after testifying generally that he notified the steerage passengers of the quarantine regulation, forbidding them from landing because Honolulu was an infected port, says that in order to see that none of them attempted to go ashore, he stationed himself at the gangplank where the quartermasters were, and then he testified as follows:

Q. What happened after that?

A. After that I went to the gangway, and stayed there to see that nobody did go ashore.

Q. Where was the ship when you went to the gangway?

A. Oh, the ship was at the quarantine station before this. I went to the gangway and stayed there till she docked.

Q. Then what steps did you take?

A. I went to the foot of the gangway, and waited for some of the men to come down—the steerage passengers.

Q. Did some of the steerage passengers come down?

A. About half an hour afterwards I seen the first bunch coming off. I told them they couldn't go ashore. They said they would.

Q. Who was present?

A. The quartermaster on the gangway.

Q. What is his name?

A. Crosby.

Q. Who else, speaking now of the officers of the "Mongolia"?

A. Well, there was a few around; I couldn't tell you exactly who it was; I didn't pay much attention.

Q. Do you know who the passengers were you had this conversation with on the gangway?

A. Yes, some of the white crew of the "Barracuda".

Q. Did you know anybody by name?

A. I don't remember their names.

Q. You know them by sight?

A. Yes.

Q. Was this man here (pointing to Alfred Iverson) one of them?

A. I seen him in the middle of the gangway, and I told him he could not come ashore; he said he would come ashore and I couldn't stop him.

(Trans. pp. 353-354.)

* * * * * * * *

Cross-Examination.

Q. And how long after the instructions did you communicate this order to the steerage passengers?

A. Right after.

Q. Where were the instructions given to you?

A. In the purser's office.

Q. You came right out?

A. Yes, sir.

Q. You went right down among the steerage passengers and gave them these instructions?

A. Yes, sir.

Q. Did you go and tell them, each one of them, individually, the instructions?

A. Yes.

Q. How many steerage passengers were there, 100; how many, 50?

A. Between 40 and 50. The steerage passengers were all in one room.

Q. Didn't they each have a room?

A. No, sir; they are all in one room.

Q. Were they all in that room when you came back from the purser's office?

A. They were all in there, and who wasn't were right by on deck.

Q. Well, were all the steerage passengers in that room?

A. Not all.

Q. Some were scattered about the steerage compartments, were they not?

A. Yes, sir.

Q. And you undertake to testify that you undertook to give each one of these men the order separately?

A. Yes, sir.

Q. Did you tell that man (pointing to Alfred Iverson)?

A. Yes.

Q. Where was he?

A. Up on deck.

Q. You told him personally?

A. Yes.

Q. How long did it take you to go among these 40 or 50 steerage passengers and tell each one separately?

A. Well, in the room there was about 20.

Q. How long did it take you to do that?

A. About ten minutes.

Q. It took you ten minutes to communicate to each steerage passenger, separately, this order?

A. Yes, sir.

Q. You didn't tell them in a group, or standing around together?

A. I told them in a group and separately, too.

Q. You gave these instructions to each one separately, is that true?

A. Yes, that is true.

Q. Did you say it in a loud voice?

A. Yes, sir.

Q. Who was present at the time, outside of the steerage passengers?

A. Some of the crew was aboard the ship.

Q. Just repeat the instructions which you gave?

A. I told them, "Nobody is allowed to go ashore, or else they have got to stay ashore, and not allowed to come back on board the ship, on account of sickness."

Q. What sickness?

A. I told them there was sickness ashore.

Q. You didn't say where these orders came from, did you?

A. Yes, sir, from the office.

Q. What office?

A. I told them from the purser's office; the purser said that nobody is allowed to go ashore; if they would go ashore they got to stay there, on account of sickness in Honolulu.

Q. You told each one of the men individually just in that language?

A. Yes, sir.

Q. Those were the exact words?

A. Yes.

Q. And to each one separately?

A. Yes.

Q. And it took about ten minutes to do that?

A. Yes.

Q. Where were you after the first-class passengers landed; when they were coming off the vessel?

A. At the gangway.

Q. Up on the deck of the vessel?

A. On the deck.

Q. You came off as soon as the vessel was moored?

A. Yes, and stayed at the foot of the gangway.

Q. The first-class passengers' gangway?

A. There was only one gangway.

Q. And you say Iverson (indicating Alfred Iverson) came down the gangway?

A. Yes.

Q. How many people was with him?

A. I think there was three or four.

Q. What did you say to him when he came down the gangway?

A. I went to the middle of the gangway and told them to stop, they couldn't go ashore; if he would go he would have to stop on shore and couldn't go to San Francisco.

Q. You say there was three people with him?

A. I don't remember just how many were with him.

Q. They all testify you was not there?

A. I was there.

Q. You told them not to go ashore, and you didn't say why, at the time they were going down the gangway?

A. I told them there was sickness ashore.

Q. Will you testify that you said there was sickness ashore at that time?

A. Yes, sir.

Q. What did you say?

A. I told them they got to stay on the ship; they couldn't go off on account of sickness in Honolulu.

Q. Did you say that to each one?

A. I told three all together.

Q. What three?

A. Three or four; I don't know who.

Q. Was that all you told them?

A. Yes; that is, the first bunch that came down.

Q. Those were the only ones you told?
A. No, sir; I told everybody that came down.
(Trans. pp. 358-362.)

The fact testified to by Trome, the steerage steward, that he notified the steerage passengers *in the steerage,* and again *on deck* of the quarantine regulation is corroborated by the following members of the "Barracouta" crew:

Chas. A. Miller. (Trans. pp. 280-281.)
J. Ramo. (Trans. pp. 312-313.)
T. De La Torre. (Trans. pp. 317-318.)
Francisco Guardado. (Trans. p. 322.)
Louis Alonzo. (Trans. p. 325.)
Edward Rosas. (Trans. p. 327)
Domingo Martinez. (Trans. p. 330.)
Joseph Medina. (Trans. p. 332.)
Joseph Fernandez. (Trans. p. 336.)

And also by

W. Isaac, the "Mongolia's" carpenter. (Trans. p. 363.)
Max Thorschmidt, the baggage steward. (Trans. p. 367.)
R. L. Halsey, U. S. Immigration Inspector, also, inferentially, corroborates Trome's evidence on this point. (Trans. p. 404.)

In the light of all this testimony, and considering the probabilities concerning the matter, we submit

that the evidence showing that these appellees had notice, before attempting to leave the ship, should preponderate over the evidence to the contrary given solely by the interested appellees themselves.

But we further submit to the Court that the steerage steward's evidence in regard to his attempt to *prevent* these appellees from subsequently leaving the ship is abundantly corroborated First, Max Thorschmidt, the baggage steward of the "Mongolia", testifies on this point as follows:

Q. Did you hear anything else said by the steerage steward?

A. No; not at that time, but afterwards, on the gangway, about half an hour, or an hour, afterwards.

Q. Well, what took place?

A. He was at the foot of the gangway.

Q. What were you doing, and what did you hear him say, in the presence of any of the steerage passengers?

A. I was on the upper deck; I don't know what he said; I was too far up, but I see him try to stop people going ashore, and they forced their way through.

Q. Who was he doing that to?

A. Passengers; people we brought off the "Barracuda" as well. There was at least eight of them, maybe nine or ten.

Q. Where were you when you saw this?

A. On the main deck, right on top of the shed; I could see from there down on the dock.

Q. Do you know the name of any of these men you saw him trying to prevent going ashore on the gangway?

A. No; it is none of my business; I don't pay attention to the names.

Q. You know any of them by sight?

A. Yes.

Q. Could you see whether or not this man (indicating Alfred Iverson) was or was not one of them?

A. I couldn't swear to it; I was about fifty feet higher than the dock.

Q. What took place after the steward made this attempt?

A. They simply marched out the gate; I seen them myself; I was in the Custom-House corral—a passenger left some hand baggage in a room, and I carried it to be examined—and while I was busy there, there was a passenger who got on at Hongkong, and a Swede, I don't know his name, I played cards with him in the evening many times, and two besides that was members of the crew of the "Barracuda", and they passed me quickly, and I looked around and hollered at them, and said: "Don't go out; you can't get back." I seen all three of the——

Q. Do you know if any of the three you spoke to got back and went to Frisco?

A. No, sir.

Q. Did you see any other members of the steerage of the "Mongolia" on shore, besides these three you saw at the Custom-House corral?

A. I saw them in the afternoon; they was outside and couldn't get on.

Q. Did you hear any conversation taking place between the ship's officers and these men?

A. No, sir.

Q. You know anything else concerning the giving of these orders to the steerage passengers, except as you have testified?

A. No, that is all I heard; I heard the steerage steward speak to some individually, and went down in the steerage; he hollered out: "No one allowed ashore, and if you do you will have trouble to get back." That is all I heard.

Q. You saw what he did on the gangplank, but didn't hear what he said?

A. No, sir.

Q. You saw what the steward was doing on the gangplank?

A. Yes, I seen him hold his hands up and the steerage passengers simply brushed him aside, and they went through.

(Trans. pp. 367-370.)

On this point CHARLES A. MILLER, the "Barracuda's" carpenter, testifies as follows:

Q. Where were you standing at the time the different steerage passengers went ashore?

A. I was standing up on the top deck, looking ashore. I was near the gangway, where I could see every one going ashore.

Q. Could you hear any conversation going on at the gangway?

A. Yes, sir; the steerage steward told them not to go ashore, and they told him that it was their business and that he had nothing to do with it.

Q. Where was the steerage steward at the time that the steerage passengers told him that, Mr. Miller? Where was the steerage steward stationed?

A. The steerage steward was stationed at the gangway.

Q. And you heard him telling them not to go ashore?

A. Yes, sir; I heard him telling them on several occasions.

Q. Did you hear him telling them also standing at the gangway?

A. Yes, sir.

Q. And what was their answer?

A. They told him that he could not stop them from going ashore.

(Trans. p. 284.)

Harry Jensen, a quartermaster on the "Barracuda", while not corroborating Trome's evidence on this point, does say that *he* attempted to go ashore, and was stopped.

Q. Before arriving at the dock at Honolulu do

you remember anything about the quarantine officials coming aboard?

A. No, I was asleep when they came aboard.

Q. You were asleep when they came aboard?

A. Yes, sir; and when I woke up I wanted to go ashore with some others, so I passed over the gangway to go past the gate, and the quartermaster stopped me. He said: "You can't go ashore; if you go, you can't return to the ship."

Q. Did he tell you why you could not go?

A. I asked him. I was pretty mad. I seen the rest of the men going ashore, and I wanted to go ashore, and I asked him why I could not go ashore as well as the rest of the men who went ashore. He told me that it was orders from the quarantine doctors. "There is a black plague ashore here, and you can't go ashore." "Now," he says, "if you go ashore, you have to take it all on your own responsibility."

(Trans. p. 302.)

But we do not have to rest our claim of corroboration entirely on this evidence, for the evidence of Halsey and Curry, both of the U. S. Immigration service, is clearly corroborative. Mr. Halsey says:

Q. Subsequently did you see these men, or any of them, again on the ship?

A. Yes, sir, I saw them, a number of them, three or four at least, on the turn of the gangway.

Q. Who was there on the gangway with you at that time, beside these men which you saw?

A. The steerage steward and Mr. Curry.

Q. Will you please tell what took place there, in your sight and hearing, at that time?

A. The men came down the gangway, the landing, the steerage steward stood at their right hand as they came down, at the head of the lower stairs; I was next to him. They were moving together as if they would come on the dock. He spoke to them to the effect that they were forbidden, on account of quarantine regulations, to come ashore; there was some language used which—was a protest against his interference. I can't recall the exact words, but they spoke in strong measures of the men of the sea, under excitement, and pushed by him and went down stairs on to the dock.

* * * * * * * *

Q. Will you state, Mr. Halsey, what was the attitude of these men towards the steerage steward with reference to the passage which they seemed to be taking down the gangplank?

A. Their attitude was rather threatening, to my mind.

Q. Can you state whether or not there was any effort made by the steerage steward to restrain these men at all from their threatening purpose to go down the gangplank?

A. I saw no physical effort except that he confronted them.

(Trans. pp. 405-406.)

Mr. CURRY, on this point, says:

Q. You were in the court-room when Mr. Halsey gave his testimony?

A. I was, sir.

Q. Are you the immigration officer referred to by him as being on the gangplank of the Steamship "Mongolia"?

A. Yes, sir, I was at that time.

Q. Will you state what you remember to have occurred at that time on the gangplank?

A. I remember that Mr. Halsey and I stood on the gangplank there; we were awaiting the time when the immigrants for this port were to be taken off the vessel, and while standing there we noticed —the steerage steward was standing opposite Mr Halsey—rather a small man—and we noticed coming down the gangplank several men; they had every appearance of being seafaring men; they were men of good size; they came down the gangplank, and when they came down they were informed by the steerage steward that the quarantine was in force that they couldn't go on shore. Their reply to that, —their attitude was threatening, and they brushed by the steward, there being no possibility for him to stop them, and went down on the dock. What became of them after that I don't know.

(Trans. pp. 409-410.)

The evidence of the appellees is that they saw no steerage steward on the gangway at the time of leaving the ship, and left without being spoken to or molested in any way.

Had one man among the steerage passengers, without conscious effort to avoid detection, publicly left the "Mongolia" without receiving any intimation of this quarantine regulation, it seems to us it would have been remarkable; but when, under the circumstances, and evidence to the contrary in this case, these five shipmates, Iverson, Murphy, Kennedy, Morrissey and Roe, all swear that they left openly and quietly, without such knowledge, it seems to us incredible.

3.

In any view adverse to ours, which this Honorable Court may take in the premises, sustaining these decrees, we submit for the Court's further decision our additional assignment of error, found on page 540 of the record, viz: the denial of appellant's motion to retax costs (Trans. p. 492), and the allowance to libelants' attorney of mileage to San Francisco and his *expenses* there, upon hearing of depositions. (Trans. p. 514 and p. 522.)

In the taxation of costs in the John Kennedy case, the clerk allowed an item of $210 for the mileage of George A. Davis, Esq. (P. 482 of the

record.) On a motion to retax costs made by the appellant, this item was affirmed (P. 522 of record), and error assigned. (P. 540 of record.)

We know of no statutory authority for the allowance of this item, and submit that its allowance under the circumstances of these suits was an abuse of discretion in the trial court.

Respectfully submitted,

E. B. McClanahan,
Proctor for Appellant.

Knight & Heggerty,
Of Counsel for Appellant.